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No. 91-1463

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

LEONORA SWORDS, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' defenses based upon oral and unrecorded agreements are barred by *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and 12 U.S.C. 1823(e) (1988 & Supp. II 1990).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A19-A25) is unpublished, but the decision is noted at 951 F.2d 345 (Table). The opinion of the district court (Pet. App. A1-A9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1991. A petition for rehearing was denied on January 30, 1992. Pet. App. A33-A34. The petition for a writ of certiorari was filed on March 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 20, 1972, petitioners purchased three pieces of property in Jefferson Parish, Louisiana. New Orleans Federal Savings and Loan Association (NOF) arranged financing for the purchases in the form of three promissory notes secured by mortgages on the properties. Pet. App. A2.

By December of 1974, petitioners were in default on the notes and mortgages. On December 18, 1974, petitioners met with the president of NOF and relinquished their rights to the mortgaged properties. In return, NOF's president orally released petitioners from the mortgages. Although NOF's attorneys wrote a letter that referred to the oral release and stated that the attorneys would prepare a release of liability to be executed by the parties, no written release was ever executed by NOF. Pet. App. A20-A21.

On January 16, 1975, petitioners sold the properties to Aberdeen-Preferred (Aberdeen) for the amount of the outstanding mortgages. Aberdeen assumed the mortgages and began making the required payments on the notes. In the fall of 1987, however, Aberdeen stopped making payments on the notes. Pet. App. A21.

In June 1986, NOF was declared insolvent, and the Federal Savings and Loan Insurance Corporation (FSLIC) was appointed receiver.[1] On December 1, 1988, the FDIC filed suit against petitioners and Aberdeen on the notes. Petitioners answered and filed a third party complaint against Aberdeen and NOF's former attorneys. In February 1990, the district court granted a

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[1] The Federal Deposit Insurance Corporation (FDIC) later assumed FSLIC's role as receiver for NOF pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, §§ 401-406, 103 Stat. 354-363.

motion for summary judgment in favor of NOF's attorneys. Pet. App. A21.

On February 4, 1991, following a bench trial, the district court issued an opinion holding that petitioners were "not released from their liability." Pet. App. A3. The court held that the defendants were barred by the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its statutory counterpart, 12 U.S.C. 1823(e) (1988 & Supp. II 1990), from relying on the alleged oral release from NOF's president. In addition, the court held that the letter from NOF's attorneys "does not act as a valid release" because it was not "executed by the depository institution." Pet. App. A6-A7.

2. The court of appeals affirmed. Pet. App. A19-A25. The court of appeals agreed with the district court that "the oral release alleged here and the release agreement referred to in the [attorneys'] letter are unenforceable against the FDIC because they are not reflected in the bank's records." Pet. App. A22. The court of appeals observed that the petitioners' "good faith and the lack of a scheme to defraud the bank are irrelevant. 'All that is relevant is that the agreements are not in the files.' " *Ibid.*, citing *FSLIC* v. *Griffin*, 935 F.2d 691, 698 (5th Cir. 1991).

ARGUMENT

Petitioners contend (Pet. 6-13) that the court of appeals erred in applying the *D'Oench* doctrine and its statutory counterpart, 12 U.S.C. 1823(e) (1988 & Supp. II 1990),[2] to this case. In particular, petitioners allege that

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[2] Section 1823(e) of Title 12 provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository

minutes of the meetings of NOF's Board of Directors and Loan Committee for January and February of 1975 are missing. See Pet. App. A29-A30. Petitioners argue that the missing minutes may have shown that the board of directors approved the oral agreement releasing petitioners from their obligations to NOF, and that petitioners should not be held responsible for the lost minutes. Petitioners' contentions merit no further review.

As an initial matter, neither the district court nor the court of appeals found that any of NOF's minutes are missing, lost or misplaced. It is not surprising that the courts below did not address that issue, because petitioners' allegations concerning the missing minutes are legally irrelevant. Petitioners would be liable to the FDIC even if they could demonstrate that NOF's minutes were missing, and even if they were entitled to assume that the missing minutes contained the board's approval of the oral agreement.[3] That is so because the

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institution, shall be valid against the Corporation unless such agreement —

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. 1823(e) (Supp. II 1990), as amended by FIRREA § 217, 103 Stat. 256.

[3] We do not agree that petitioners are entitled to the benefit of any such assumption. In similar circumstances, the courts have rejected borrowers' arguments that they need not produce a written

D'Oench doctrine, in both its common law and statutory forms, expressly requires that any agreement that diminishes the interest of the FDIC in an asset acquired by it must be (1) in writing, (2) executed by the financial institution, (3) approved by the institution's board of directors or loan committee, and (4) continuously in the financial institution's official records. A notation in NOF's minute books that the board of directors or loan committee had approved an agreement releasing petitioners from their obligations would not satisfy the requirements of *D'Oench* or Section 1823(e) absent a corresponding written and executed release in NOF's official records. See 12 U.S.C. 1823(e) (1988 & Supp. II 1990); *Beighley* v. *FDIC*, 868 F.2d 776, 782 (5th Cir. 1989) (common law *D'Oench* doctrine and its statutory counterpart bar similar defenses); *Kilpatrick* v. *Riddle*, 907 F.2d 1523, 1526 n.4 (5th Cir. 1990) (same), cert. denied, 111 S. Ct. 954 (1991). Petitioners have never contended that such a release exists; indeed, they have conceded that it does not. See Pet. App. A6. Consequently, petitioners' argument based on the allegedly missing minutes cannot absolve them of liability to the FDIC.

Petitioners are incorrect in suggesting (Pet. 10, 11) that the *D'Oench* doctrine does not apply unless the borrower is guilty of fraud or wrongdoing. The essence of the *D'Oench* doctrine is that the FDIC is entitled to rely, to the exclusion of any extraneous matters, on the official bank records that set forth the rights and obligations of the bank and those to whom the bank lends money. The purposes underlying this rule are to allow federal and state examiners to rely on a bank's official

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agreement if the records of the financial institution are incomplete. See *RTC* v. *Ruggiero*, 756 F. Supp. 1092, 1097 (N.D. Ill. 1991); *RTC* v. *Madison Street*, No. 89-4212 (E.D. La. Aug. 31, 1990).

records in evaluating the worth of the bank's assets, to encourage prudent consideration in lending practices, and to assure proper recordation of banking acts to guard against collusive or erroneous reconstruction of terms. See *Langley* v. *FDIC*, 484 U.S. 86, 91-93 (1987). Accordingly, agreements that do not meet the requirements of *D'Oench* and 12 U.S.C. 1823(e) (1988 & Supp. II 1990) are unenforceable even if the borrower is innocent of any fraud or other wrongdoing. "Simply put, transactions not reflected on the bank's books do not appear on the judicial radar screen either." *Bowen* v. *FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990).[4]

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[4] Petitioners cite (Pet. 11) *FDIC* v. *Meo*, 505 F.2d 790 (9th Cir. 1974), for the proposition that they have clean hands and therefore should be permitted to rely on the alleged oral agreement as a defense against the FDIC's claim. As other courts have recognized, however, *Meo* is obsolete in light of this Court's decision in *Langley*. See *FSLIC* v. *Gordy*, 928 F.2d 1558, 1567 n.14 (11th Cir. 1991) (*Meo* "is based on an outdated understanding of the *D'Oench* doctrine"); see also *Baumann* v. *Savers Fed. Sav. & Loan Ass'n*, 934 F.2d 1506, 1516 (11th Cir. 1991), petition for cert. pending, No. 91-1118. Following *Langley*, the courts of appeals have held that good faith is irrelevant to the application of *D'Oench*. See, *e.g.*, *Beighley* v. *FDIC*, 868 F.2d 776, 784 (5th Cir. 1989); *Taylor Trust* v. *Security Trust Fed. Sav. & Loan Ass'n*, 844 F.2d 337, 342 (6th Cir. 1988). In any event, the facts of *Meo* differed from the facts of this case. In this case, unlike in *Meo*, petitioners neglected to ensure that the alleged oral agreement was reduced to writing. And in this case, unlike in *Meo*, petitioners sought to defend against the FDIC's claim by relying on an alleged oral agreement with the lender.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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